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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947

No.

IRWIN KOTT, ISRAEL NEEDLEMAN AND HARRY WEINER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

I.

Nowhere does it appear in the Government's statement of the facts that, from the mouths of the prosecution witnesses, *a large scale conspiracy* was shown to exist between the Federal Alcohol Tax Unit Agents and John, the chief Government witness, whereby they plotted, planned and cooperated in the "making of cases" against whiskey sellers based upon asserted violation of the O. P. A. price ceiling regulations. The Government's brief conveniently ignores at least three other joint enterprises between the federal agents and John in which unsuspecting whiskey sellers were induced and caused to enter into transactions with John for the sale of whiskey at prices in excess of ceiling and in which the unwary sellers were pounced upon and arrested; the money paid by John to them was seized and returned to him and he was permitted to go scot free, meanwhile enjoying the fruits of the nefarious conduct.

These were the so-called "Cooper-Rudy deal" (R. 255; 303), the "Morton deal" (R. 303) and the "Boston" venture (R. 729).

These are facts of vital importance. They support the first point, presented in the petition, that the Emergency Price Control Act of 1942, 56 Stat. 28, as amended, 50 U. S. C. A. App. §§ 904, 925 was never intended to make criminal pretended "over ceiling" sales trumped up, engineered and produced by the joint machinations of an habitual violator of the Act and federal agents. The object of the statute was the protection of *ultimate consumers*. Buyers such as John who purchased in the course of trade for business were not only not protected by the Act but were specifically made subject to its penal provisions. § 4 of the Act, 50 U. S. C. A. App. § 904.

In reality there was no over-the-ceiling sale in this case. It was merely a sham and one which was designed by the federal agents for the purpose of "catching" petitioners and punishing them.

It is submitted that upon the Government's proof the conduct of petitioners was not such as was intended to be punished under the provisions of the Act. Cf. *Sorrells v. U. S.*, 287 U. S. 435.

II.

In answer to petitioner's contention, apart from their assertion that the record discloses an entrapment requiring a reversal, the Government states "These were no innocent persons instigated to illegal action; these were illegal operators who 'acceded without hesitation and as a matter of course' to an offer to purchase. *Casey v. United States*, 276 U. S. 413, 419." (Brief in Opposition, p. 8). But, this assumes the conclusion. *There was no evidence, properly admitted, to support such a contention.* Upon this record, it cannot be said that petitioners were previously guilty or prior to this transaction "illegal operators".

It must be remembered that in this case, unlike in *Casey v. United States, supra*, entrapment was urged as a

reason for acquittal. In the *Casey* case the majority of this Court did not feel at liberty to accept the suggestion by the Court itself "that the Government induced the crime." As stated by Justice Holmes, "A Court rarely can act with advantage of its own motion, and very rarely can be justified in giving judgment upon grounds that the record was not intended to present." (276 U. S. at pp. 418, 419).

Moreover, the Court was there dealing with a narcotics case, where the transaction itself was illicit. Here, the sale of the whiskey was perfectly proper and legal, apart from the price at which it was sold. The Court there stated "We are not persuaded that the conduct of the officials was different from or worse than ordering a drink of a suspected bootlegger." (276 U. S. at p. 419). Here, petitioners were not bootleggers and the actions of the federal officials went far beyond merely ordering a drink from a suspected bootlegger. The record discloses a course of conduct on the part of federal agents which was reprehensible and vicious. It is not to be any the less condemned merely because some of the actions against petitioners were initiated by John, a private person, in league with the federal officials. *Cf. Anderson v. U. S.*, 318 U. S. 350, 356.

Petitioners submit that what Justice Brandeis dissenting in *Casey v. United States,* 276 U. S. at 423, stated is here pertinent: "I am aware that courts—mistaking relative social values and forgetting that a desirable end cannot justify foul means—have, in their zeal to punish, sanctioned the use of evidence obtained through criminal violation of property and personal rights or by other practices of detectives even more revolting. But the objection here is of a different nature. It does not rest merely upon the character of the evidence or upon the fact that the evidence was illegally obtained. The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The Gov-

ernment may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."

III.

The Government's brief in opposition to the petition makes the surprising statement that "it is immaterial whether Hillman was or was not an agent of petitioners or a co-conspirator with John to render admissible the testimony in regard to Hillman's offer to John and John's statement to Pace about that offer" (p. 9). The Government thus abandons the reasons relied upon by both courts below for admitting this evidence (R. 109; 1233; 163 F. 2d 984, 987, 988) as it must, in view of *Fiswick v. U. S.*, 329 U. S. 211, conveniently ignored by the Circuit Court and the Government's brief. The Government is apparently confusing the question of the *relevancy* of evidence offered to prove a fact with the *competency* of that which is offered in evidence. Assuming arguendo that whether petitioners had *previously* committed the offense of sale of whiskey at over ceiling price was relevant to the issue, such fact could only be proved by competent evidence. Manifestly, such fact could not be proved by bald hearsay statements. Hillman's declarations were not admissible against petitioners without independent proof that he was connected with the conspiracy charged by the Government or that he was *then* acting as an agent of the petitioners. "However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy, *Minner v. United States*, 57 F. 2d 506; and see *Nudd v. Burrows*, 91 U. S. 426. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U. S. 60, 75; *Fiswick v. United States*, 329 U. S. 211; *United States v. Blumenthal*, — U. S. —, decided December 22, 1947.

At its best, John's testimony of Hillman's statements only shows that *John and Hillman* were predisposed to commit the offense—certainly not as incorrectly stated in the Government brief (p. 9) "that the *accused* were predisposed to commit the offense."

Weathers v. United States, 126 F. 2d 118 (C. C. A. 5), cert. den'd, 316 U. S. 681 and *United States v. Becker,* 62 F. 2d 1007 (C. C. A. 2) relied upon by the Government are not in point. In neither case was the evidence admitted by the trial court challenged on the ground that it was hearsay. In the *Becker* case, the Court expressly alluded to the fact that the challenged evidence "was not an unsworn declaration and so hearsay." (62 F. 2d at 1009).

Nor can John's statement to Pace about the Hillman offer be regarded as "reasonable grounds" to support Pace's belief in petitioners' guilt of previous black market operations. What John told Pace was a mere statement, otherwise completely unsupported, that Hillman *said* he was representing Distillers Factors Corporation. Certainly, such hearsay upon hearsay cannot be "reasonable grounds" for Pace to believe *petitioners* were "predisposed to commit the offense." Particularly so, since, at the time when John reported the Hillman conversation to Pace and until the sale here involved John had never had any dealings with the petitioners (R. 298, 299) and there was no evidence that petitioners had any previous illegal dealings with anybody, or that Pace had any such evidence. This Court, speaking of an illegal search, stated: "In law it is good or bad when it starts and does not change character from its success." *U. S. v. Di Re,* — U. S. — decided Jan. 8, 1948. Similarly, an "illegal" entrapment in which, when undertaken there is no reasonable ground to believe the victim had engaged in prior similar offenses, does not change its character because of its success. Nor does it become any the less "illegal" because of evidence obtained by the federal agents during the course of the entrapment. "Reasonable grounds" to believe in petitioners'

prior guilt must have existed when the Alcohol Tax Unit Agents undertook this entrapment. Such "reasonable grounds" cannot be based upon something turned up *after* the entrapment has begun to work on the petitioners.

In the footnote to page 9 of the Brief in opposition, it is asserted that "Hillman's agency for petitioners at the time he made the offer to John was in fact established, not only by Hillman's own statements to that effect, but by Kott's willingness to talk with John at the time of his first telephone call asking for Hillman (R. 117-118), and by the admissions of Weiner and Needleman that Hillman had been their representative (R. 127-128)." This misleading assertion does not accurately reflect the record. *Hillman did not testify.* His "own statements" are John's declarations that Hillman stated he represented Distillers Factors Corporation. Kott's speaking over the telephone to one who called him from Mississippi clearly sheds no light on Hillman's authority on behalf of petitioners to offer whiskey at over-the-ceiling prices to John *four months* previously. Neither Needleman nor Weiner "admitted" that Hillman "had been their representative" in making such offer. Weiner denied ever being with John in New York (R. 1032-1035) and Needleman denied that Hillman was an agent of petitioners or that he had so stated to John (R. 1087; 1094). John's testimony that Needleman said to him that Hillman "had collected some money, around $25,000.00 from different people, and hadn't turned it in to them—" (R. 127) clearly fails to establish that Hillman was petitioners' agent, four months previously, to offer whiskey at over-ceiling prices.

Nor can it be correctly asserted that the error in admitting John's testimony of Hillman's offer in July was harmless. In the first place, without such evidence the entrapment concededly is "illegal" and therefore the convictions must be reversed. Secondly, without it there was no justification for the Court's leaving to the jury the question of whether at the time the Government agents and

John set out to entrap petitioners "they were *already* engaged in . . . the sale of liquor at black market" (R. 1238). Finally, the erroneous admissions into the evidence of John's testimony concerning Hillman's offer to him in July, 1945 must have influenced the jury in considering petitioners' denial that they had sold the whiskey here involved at an over-the-ceiling price. Consequently, reversal must follow. *Kotteakos v. U. S.*, 328 U. S. 750; see *U. S. v. Blumenthal*, — U. S. —, decided December 22, 1947.

IV.

The Government apparently misapprehends the third question presented by the petition. Petitioners question the propriety of their trial in the Western District of Louisiana where the record shows as the only basis for trial there (over their objections) the commission of an incidental act following conduct sufficient to warrant prosecution in New York; and especially where the record shows that commission of such act was instigated, induced and caused by the federal agents for the purpose of enabling petitioners' prosecution and trial in Louisiana as shown by the testimony of Pace, the chief Alcohol Tax Unit Investigator, to the effect that his object was "getting this violation down here for trial" (R. 731), as well as that of Government witnesses John and Barlow (R. 321; 326; 332; 390; 637; 639; 640).

Petitioners complain not merely of a refusal to grant a change of venue. Petitioners contend that their trial in Louisiana was a substantial violation of the protection afforded to them under the United States Constitution, Article 3, Section 2, Clause 3 and the Sixth Amendment because of the "dirty business" of the Government agents in luring Kott into the commission of an incidental act in Louisiana merely to fasten venue there. The Government's brief concedes that petitioners were lured into Louisiana, but attempts to gloss over the reprehensibly vicious con-

duct on the part of the federal agents by stating that "petitioners were not lured into committing an offense in the south" (p. 11). This is indeed a novel approach to the serious question ofthe proper venue of criminal trials. It assumes either that trial of petitioners could be legally held in one section of the "south" as well as in another or that trial in that part of the "south" selected by the entrapping agents was in fact less prejudicial to petitioners than their trial in any other part of the "south". Certainly, such an attitude is not consistent with either the spirit or letter of the Constitution. *United States v. Johnson,* 323 U. S. 273.

The Government's brief states "That the Alcohol Tax Unit investigators may also have preferred to have the cash representing the illegal purchase price transferred in Louisiana, rather than in Mississippi, thus becomes immaterial" (p. 12). To the petitioners, trial in Louisiana conducted by the judge who made the following comment even before the trial itself began was certainly not immaterial:

> "In other words, if as the Government contends, these defendants were engaged in the business up there of operating a distillery and dealing in black market liquor, and so forth, it would be somewhat unique, to say the least, to have them carry that on, and stay *within their hole,* so to speak, and then when a criminal case against them might arise in some other jurisdiction, or some other section to say that it could not be heard in that section, but that it must be brought back there to their own doorsteps to be tried.
>
> "The case is not one like a murder case, or something like that, which can have such terrible effects or consequence on the defendants, but I was impressed with the fact that where a transaction took place in New York, or New Jersey, as the Government alleges, and the final, consummation of the sale made in another jurisdiction, if it were possible for people engaging in

this kind of business to set up their operations and engage in it in a friendly community and then if *they could take the position that they could only be charged in that locality and not have to account for their acts all over other portions of the country, it seems to me it would be a very easy matter for them to carry on such illegal operations and never have to pay the penalty therefor.*" (Italics supplied.) (R. 63.)

Petitioners contend that the action of the federal agents in luring Kott into Louisiana for the purpose of holding him, Needleman and Weiner for trial in Louisiana deprived such overt act of the quality it would otherwise have possessed of laying the venue for trial in Louisiana. Forcing petitioners to trial there deprived them of the protection afforded by the United States Constitution, Article 3, Section 2, Clause 3 and the Sixth Amendment.

V.

In answer to petitioners' contention that the trial court committed reversible error in denying petitioners' motion to transfer the proceedings to the Southern District of New York, the Government relies upon *Shurin v. United States,* 164 F. 2d 569 (C. C. A. 4), cert. pending at 521, this term. But in that case there was no showing by the defendant of any reason for a transfer under Rule 21 (b) of the Federal Rules of Criminal Procedure and in the view of the Circuit Court of Appeals which decided *Shurin v. United States* there was serious doubt whether Rule 21 (b) had any application to the case since it appeared that the entire offense had been committed in the district where the trial was had. Here, there can be no doubt that from the indictment it appears "that the offense was committed in more than one district." Therefore, under Rule 21 (b) upon motion of petitioners the Court was compelled to transfer the proceedings to the Southern District of New York if satisfied that such transfer was required "in the interest of justice."

Petitioners assert that the record discloses that the trial court's denial of the motion for transfer was based on his prejudgment of the case and his desire that *they be convicted.* This is apparent from his statement (R. 63), quoted *supra,* pp. 8-9. In support of the motion that in the interest of justice the trial should have been transferred to New York petitioners showed that the following witnesses were available and would testify voluntarily if the trial were held in N. Y.:

(a) Office personnel who observed the negotiations.

(b) Four other persons who saw and heard the negotiations.

(c) Two women guests of John and Pace who were in the hotel rooms during the conference.

(d) The notary public before whom John swore to the facts contained in Affidavit G-2.

(All of the above witnesses are residents of New York, N. Y.)

(e) Five witnesses who would testify to a similar course of conduct on the part of Pace and John in Boston in their endeavor to entrap other persons into the commission of similar offenses.

(f) Another witness to show a similar entrapment in Chicago.

(g) Three witnesses residing in Baltimore, Maryland who would testify to yet another similar entrapment.

(h) Character witnesses residing in New York, who would testify on behalf of petitioner Weiner.

(i) Five witnesses, residents of New York, would testify in support of Weiner's contention that he was absent from New York during the negotiations (R. 31-48).

(j) Three witnesses, employees of a U-Drive-It-Company, from whom the automobile used in the trip to Connecticut was rented, would testify that Weiner did not hire the vehicle (R. 31-42).

Petitioners showed that the above witnesses would testify voluntarily if the trial were held in New York but that the cost of bringing all such witnesses to Monroe, Louisiana for an extended trial would be prohibitive and that such witnesses could not afford to absent themselves and would not voluntarily do so for an extended period of time from their homes and businesses if the trial were held in Louisiana. Petitioners also averred the lack of adequate transportation and hotel facilities (R. 36). There was no countervailing reason for insisting upon trial in Louisiana. Yet the trial court summarily denied the motion, an action dismissed by the Circuit Court as "merely an erroneous exercise of discretion."

The Government in support of the trial court's action states (p. 10 of the Brief in Opposition): "Petitioners were not impecunious defendants who could not afford to pay the expenses of such office personnel as they desired to call, and they manifestly had control of such witnesses." There is nothing in the record to support that statement. And, in any event, the benefits of Rule 21 (b) are not to be denied to all who are "not impecunious defendants." According to a member of this Court's Advisory Committee, the Rules permit transfers in anti-trust cases, where it may be presumed that the defendants are "not impecunious." See N. Y. U. Institute Proceedings, pp. 170-171, 274, 275; cf. *U. S. v. National City Lines*, 7 F. R. D. 393 (D. C. Cal.)

The Government's brief also states "The other witnesses whom they stated they wished to call to testify to alleged entrapments by John upon other occasions were clearly unnecessary, since their testimony would have been irrelevant" (p. 10). The other witnesses referred to by the Government would have been called to testify to further

entrapments *not by John but rather by the same federal agents who entrapped the petitioners.* Clearly proof of such similar entrapments was material and relevant to the issue of whether the federal agents instigated, caused and induced the commission of the acts asserted to be criminal in this case. Even the trial court recognized this and the record shows at least three other instances of entrapments by federal agents in conspiracy with John, the chief government witness.

That the Louisiana trial judge stated he normally limited character witnesses to two is totally irrelevant. In no way does it diminish the harm and prejudice to a defendant who would have been able to call character witnesses had the trial been held in New York.

Finally, the Government brief attempts to justify the clearly erroneous denial by the trial court of the motion to transfer on the assertion that petitioners were benefited "by having their trial in Louisiana, since a major portion of their defenses consisted of attacks on the credibility of John, the Government's chief witness, and the witnesses whom petitioners called on this issue all resided in the region where the trial was had." (pp. 10 and 11). The simple answer to this assertion is that petitioners were compelled to conduct their trial in that manner *because* the trial court's denial of the motion to transfer deprived them of their opportunity to call the numerous the witnesses who would have testified affirmatively in their behalf.

That petitioners were harmfully prejudiced by the denial of their motions to transfer under Rule 21 (b) is amply clear from the Record.

Petitioners repeat that the action of the trial court was clearly a frustration of the purposes intended to be accomplished by the promulgation of Rule 21 (b) and ran counter to the principles enunciated by this Court even prior to the adoption of the Rules of Criminal Procedure. See *Hyde v. Shine,* 199 U. S. 62, 78 and *United States v. Johnson,* 323 U. S. 273, 276. Because there was no proper

basis for it, the Court's denial of the motion under Rule 21 (b), was not "merely an erroneous exercise of discretion" as stated by the Circuit Court of Appeals, but was such reversible error as requires correction by this Honorable Court.

VI.

The Government brief (pp. 12 and 13) also misapprehends the questions brought forward as No. 7 of the petition. Petitioners maintain that the trial court improperly restricted the cross-examination of John, the chief Government witness, in two respects: (a) It was error to cut off the inquiry with regard to John's multifarious illicit activities in Mississippi (R. 220; 265-6). Petitioners had a right to show John in his true colors even if in the process of doing so many details of the "Mississippi mess" (R. 916) might be exposed. Petitioners' right of cross-examination could not be denied upon such an irrelevant collateral consideration. (b) The pre-cross-examination procedure adopted by the trial court was harmfully erroneous. When the trial judge ordered a dress-rehearsal cross-examination of John, preceding his cross-examination in the presence of the jury, he deprived petitioners of the opportunity to accomplish the most fundamental object of such interrogation: to expose the "facts which diminish the personal trustworthiness or credit of the witness." 5 *Wigmore on Evidence,* Section 1368. Petitioners were entitled to have the jury observe the *initial* reaction of the witness to the questions put to him—and petitioners are not now referring (as the Government's brief suggests) to improper questions. The Government brief ignores the fact that in response to admittedly proper questions, John was so shifty, evasive and untruthful that the Court repeatedly found it necessary to admonish him (R. 206; 207; 238; 239; 246; 249; 252-253; 254; 256.) The jury ought to have been permitted to observe the manifest lack of veracity by reason of the witness' own testimony and demeanor. A perusal of John's preliminary cross-examination at the refer-

ences indicated conclusively refutes any thought that he was merely mistaken and supports the charge of deliberate falsehood. As stated by Justice Story in *The Santissima Trinidad,* 7 Wheaton 238, 339, "and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus.* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses . . . have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, no court of justice could venture to rely on it, without danger of being betrayed into the grossest errors." It is submitted that as a result of the trial Court's action, sanctioned by the Circuit Court of appeals, the *jury* was "betrayed into the grossest" error.

VII.

The Government's brief (p. 14) seeks to support the action of the trial court in quashing petitioners' subpoena directing the production of John's books on the ground that "the ruling was in line with the judge's efforts on the cross-examination of John to keep collateral issues within reasonable bounds, and was clearly proper." This is indeed a unique misapplication of Rule 17 (c), the entire purpose of whch is to permit *discovery.* Relevancy was not even then before the Court. Petitioners had a right to inspect these books. Whether, what they found would be admissible was a question which would not be reached until after discovery and upon proffering the facts learned in the evidence.

In any event, there was no showing that "compliance would be unreasonable or oppressive" and, therefore, the Court's ruling was erroneous and expressly in violation of Rule 17 (c). This was prejudicial error and in violation of petitioners' fundamental right to produce evidence

in their own behalf, the very minimum requirement of due process.

VIII.

Petitioners repeat that this is a case which eminently deserves review by this Honorable Court. Apart from the serious constitutional questions which are raised, the lower court's rulings on the application of the Rules of Criminal Procedure 21 (b) and 17 (c) are challenged. It is submitted that the importance of the questions affecting the administration of federal criminal law here presented calls for the exercise of this Honorable Court's supervisory power over federal criminal prosecutions under the rule of *McNabb v. United States,* 318 U. S. 332.

Respectfully submitted,

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